

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
SAN DIEGO UNIFIED PORT DISTRICT)
For Review of Addenda No. 1 to Order)
Nos. 85-01 (NPDES Permit No.)
CA 0107646); 85-02 (NPDES Permit)
No. CA 0107654); 85-03 (NPDES Permit)
No. CA 0107719); 85-06 (NPDES Permit)
No. CA 0107671); 87-49 (NPDES Permit)
No. CA 0108006); 87-65 (NPDES Permit)
No. CA 0108332) of the California)
Regional Water Quality Control Board,)
San Diego Region. Our File No. A-651.)

ORDER NO. WQ 90-3

BY THE BOARD:

On October 23, 1989, the California Regional Water Quality Control Board, San Diego Region (Regional Board) adopted an addendum to each of six National Pollutant Discharge Elimination System (NPDES) permits/waste discharge requirements previously issued to certain boatyards and shipyards that are tenants of the San Diego Unified Port District (Port District). The Addenda added the Port District as a responsible party to those permits. On November 22, 1989, the Port District filed a timely petition for review of the action. The petition was amended on January 17, 1990. Petitioner also requested a stay of the action.

I. BACKGROUND

In 1985 and 1987, the Regional Board issued waste discharge requirements/NPDES permits to six boatyards and shipyards operating on property owned by the Port District. On October 23, 1989, the Regional Board adopted Addendum No. 1 to each of the six permits. The Addenda imposed an extensive program on each of the dischargers to monitor bay sediment and their discharges, and also added the Port District as a responsible party for all obligations under the permits. The Port District's petition challenging the Regional Board's action requests either that it be removed as a responsible party or that it be named only secondarily responsible for permit compliance, and that its responsibilities be limited to certain aspects of the permits not involving the monitoring requirements or the day-to-day operations of the facilities.

The Port District also requested a stay of the Addenda to the extent that they add the Port District as a responsible party pending the State Board's determination of its petition.¹

II. CONTENTIONS AND FINDINGS

1. Contention: The Port District (petitioner) contends that because it is a non-operating landowner it is not subject to the NPDES permit requirements.

¹ The Port District was provided an opportunity to supplement its request for a stay which it did supplement. However, because the merits of the petition will be addressed in this order, it is not necessary to address the request for a stay.

Finding: Because neither the federal or state law or regulations specify who must be named in a permit, we find that it is within the Regional Board's discretion to name a non-operating landowner in waste discharge requirements/NPDES permits.

The Port District contends that under the federal regulatory scheme, as administered by the Regional Board through the Porter-Cologne Water Quality Control Act (Water Code), only facility operators, not non-operating landowners, are subject to the NPDES permit requirements. The Port District bases this contention on the language of the Clean Water Act which prohibits the "discharge" of any pollutant except in compliance with a permit, in this case an NPDES permit. 33 U.S.C. Section 1311(a), 1342(a).² The Port District also relies on federal regulations that require "any person who discharges or proposes to discharge" pollutants to obtain the permit. 40 C.F.R. Section 122.21(a). Where there is a non-operating landowner and an operating tenant, the operating tenant must apply for the permit:

"Who Applies: When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit."
(40 C.F.R. Section 122.21(b))

² Chapter 5.5 of the Water Code authorizes the State to implement the federal Clean Water Act. Water Code Sections 13370, et seq. The California Code of Regulations specifies that NPDES permits are to be "administered in accordance with the currently applicable federal regulations for the National Pollutant Discharge Elimination System (NPDES) program." 23 Cal. Code Regs. Section 2235.2.

The Port District also contends that the Water Code supports the conclusion that only operators are subject to the NPDES permit requirements. Water Code Section 13376 authorizes the issuance of NPDES permits in the form of waste discharge requirements to any person "discharging pollutants" or "proposing to discharge pollutants." Water Code Section 13376 states that the person discharging or proposing to discharge must file a report of waste discharge, "except that no report need be filed under this section for discharges that are not subject to the permit application requirements" of the Clean Water Act. The Port District contends that since the Clean Water Act NPDES permit requirements apply only to operators, the waste discharge requirements apply only to operators.

We disagree with the petitioner's contentions. The Clean Water Act, 33 U.S.C. Sections 1311 and 1342, requires a permit for the discharge of pollutants. The Water Code requires a person who discharges or proposes to discharge to file a report of waste discharge and obtain waste discharge requirements (permit). Water Code Sections 13376, 13260, 13263. However, neither statute specifies who is to be named in permits. The question is whether the permit requirements themselves, as opposed to the obligation to file for a permit, apply to non-operating landowners as well as to operators.

Several federal regulations are relevant to this issue. The federal regulation, quoted above, that most closely addresses the issue, 40 C.F.R. Section 122.21(b), does not preclude the

Regional Board from naming landowners in NPDES permits. The State Board has interpreted this regulation in Order No. 87-5 (U.S. Department of Agriculture, Forest Service). The petitioner in that order contended that since federal regulations require the operator to apply for a permit, the landowner is not to be included in the permit. The State Board concluded:

"The conclusion does not follow from the premise. Clearly a landowner who plans no discharge need not apply for a permit. But if the landowner, or someone with permission to use his or her land, wants to discharge, a permit must be obtained. The regulations deal only with who must apply, not who may be named." (Order No. 87-5, at 4.)

The Port District has pointed out that Water Code Section 13376 has been repealed and added since Order No. 87-5 was issued. In 1987, the Legislature added a sentence to the previous Section 13376 stating that "no waste discharge requirements or permit is required . . . if no state or federal permit is required under" the Clean Water Act. The change in Section 13376 does not change the conclusion that landowners may be named in NPDES permits. The federal regulation, 40 C.F.R. Section 122.21(b), has not been changed and therefore remains silent on the issue of whether landowners may be named in permits.

Other relevant federal regulations do not specify who must obtain a permit and do not preclude the Regional Board from naming a non-operating landowner. The permit requirements are

directed at controlling the discharge from the facility or the activity that is the source of the discharge. They do not limit the permit requirements to "operators." For example, the federal regulations define the term "discharge of a pollutant" as

"(b) Any addition of any pollutant or combination of pollutants to the waters of the 'contiguous zone' or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any 'indirect discharger.'" (40 C.F.R. Section 122.2.)

The regulations define "new discharger" as "any building, structure, facility, or installation." 40 C.F.R. Section 122.2. Since the federal regulations focus on controlling the discharge, it is consistent with those regulations to conclude that the owner of the land that is the source of the discharge be responsible for that discharge and is, therefore, a discharger. In addition, the Port District may in some cases be the owner of the pipes or other conveyances through which the pollutants are discharged.

Finally, Section 510 of the Clean Water Act, 33 U.S.C. Section 1370,³ authorizes the states to impose more stringent requirements than those required by the Clean Water Act and its regulations. The Clean Water Act establishes a minimum standard; the states may go beyond that minimum standard. At a minimum, the state must name the operator as a responsible party in NPDES permits, but the state may also name the non-operating landowner.

2. Contention: The Port District contends that State Board orders naming landowners in NPDES permits or waste discharge requirements are incorrectly decided because they confuse the distinction between a "discharger" under the statutory and regulatory framework governing permits (Water Code Sections 13260 and 13263) and "a person who has permitted a discharge" under the statutory scheme governing cleanup and abatement orders (Water Code Section 13304).

Finding: The State Board has properly concluded that non-operating landowners may be considered "dischargers" within the meaning of the Water Code.

3 Section 510 states in part:

"Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any state or political subdivision thereof or interstate agency to adopt or enforce (A) any standard of limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such state or political subdivision or interstate agency may not adopt or enforce any effluent limitation, . . . which is less stringent than the effluent limitation, . . . under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters (including boundary waters) of such states."

The Port District points out that the State Board has named non-operating landowners in waste discharge requirements by referring to the standards it has also applied for naming non-operating landowners under cleanup and abatement orders -- i.e., that the landlord was in a position to prevent the discharge and knew or should have known that the discharge was taking place. The Port District argues that the Legislature would not have used different language in these provisions if they were to be interpreted identically.

We disagree with petitioners' contention on this issue. The same analysis applied to cleanup and abatement orders also applies to waste discharge requirements, even though the statutory language is different. This language difference stems largely from the fact that the cleanup and abatement order sections address past discharges whereas the waste discharge requirement sections address the obligation of current dischargers. However, the statutes contain no differences relating to the issue of responsibility, whether it be responsibility for a discharge or responsibility for a cleanup. Where the landowner has knowledge of the activity and has the ability to control the activity, it is reasonable to conclude that such landowner is a discharger.⁴ The discharge could not occur without the landowner allowing the tenant to operate the

⁴ See Memorandum from William R. Attwater, Chief Counsel of the State Board, to Regional Board Executive Officers (May 8, 1987), stating that the person who owns land on which a discharge is occurring is a discharger under the Porter-Cologne Act. See 26 Ops.Cal.Atty.Gen. 88 (Opinion No. 55-116, Aug. 30, 1955).

activity on the land. In addition, the source of the discharge is the land and activities on the land. In this case, the Port District owns the land on which all the permitted facilities operate. The Port District knows of the potential for discharges of waste from the facilities and has the ability under lease provisions to control activities on the leased premises. Thus, it was proper to name the Port District in the waste discharge requirements. Since the source of the discharge is the land owned by the Port District, it is a discharger under the Water Code.

Water Code Section 13270 also supports the conclusion that it is appropriate to name non-operating landowners in waste discharge requirements. Section 13270 prohibits a Regional Board from requiring a report of waste discharge and from issuing requirements to any lessor public agency which leases land to another public agency or to any public utility regulated by the Public Utilities Commission, unless the lease from the lessor public agency contains restrictions which unreasonably limit the ability of the lessee to comply with waste discharge requirements. This provision would not have been necessary if the Regional Boards could not issue waste discharge requirements to landowners.

3. Contention: In the alternative, the Port District contends that it should be excluded from permit requirements pertaining to the tenants' monitoring and day-to-day operations or at most it should be held only secondarily liable for permit obligations.

Finding: We agree with the Port District on this point. The Port District correctly concluded that the Regional Board did not intend to require the Port District to be primarily responsible for compliance with the NPDES permits. Several actions of the Regional Board staff support this conclusion. In a letter to the Port District, the Executive Officer stated:

"It is not the Regional Board's intent, in adopting the above Addenda, to subjugate the responsibility of the tenants to maintain full compliance with the terms and conditions of their NPDES permits. The tenants in their capacity as operators of the facilities, retain the primary responsibility to maintain compliance and to take remedial action to correct any violations."

(Letter from Ladin Delaney, Executive Officer, Regional Water Quality Control Board, to Don Nay, Director, San Diego Unified Port District, November 2, 1989. (Exhibit 1 to Supplemental Declaration of David B. Hopkins in Support of Petition of San Diego Unified Port District for Stay, filed November 27, 1989).)

In addition, the Regional Board staff has not included the Port District in negotiations with the operators resulting in the monitoring program required as part of the Addenda. Finally, the Executive Officer stated in response to the petition:

"The Regional Board will give the Port District early notice of any permit violations by the tenants and the Port will have ample opportunity to exercise its own authority to have the tenant correct the violation before the Regional Board holds it responsible. We believe that the Regional Board's intent to enforce against the Port District only as a last resort leaves ample room for cooperation between the two agencies."

(Response of Regional Board to Petition File No. A-651, page 7 (March 30, 1990).)

The letter from the Executive Officer to the Port District, the Regional Board staff actions, and the Regional Board's response to the petition clarify the intent of the Regional Board. However, the language of the Addenda is not consistent with that intent. The Addenda to the six permits states that "the Regional Board will take enforcement action against the Port District for violations only if [the boatyard or shipyard] fails to comply with Order No. [] and Addenda thereto." This language places the Port District in the same position as the tenant since presumably the Regional Board will not take enforcement action against the tenant unless it fails to comply with the order.

State Board orders addressing the issue of landowner liability for waste discharge requirements and NPDES permits have found that landowners have a responsibility for ensuring compliance with the requirements and, therefore, that it is appropriate for Regional Boards to name landowners. However, we have also concluded that landowners should not be held responsible for day-to-day compliance with waste discharge requirements. See Order No. WQ 86-11 (Southern California Edison Company). Unlike the waste discharge requirements discussed in Order No. WQ 86-11, these waste discharge requirements do not clearly place the responsibility for the monitoring program and day-to-day compliance on the lessee. The waste discharge requirements should be remanded to the Regional Board to clearly specify that the Port District is not primarily responsible for the monitoring program and day-to-day operations of the facility.

The requirements should more clearly place the responsibility for day-to-day compliance and compliance with monitoring on the operator, and should clearly specify the appropriate responsibilities of the Port District. In addition, because the Port District is a public agency, it should, like the United States Forest Service in Order No. WQ 87-5 (United States Department of Agriculture, Forest Service),⁵ be afforded the opportunity to obtain compliance from the tenant prior to enforcement by the Regional Board against the Port District.

We do not mean to suggest that non-operating landowners should be named in every NPDES permit issued by Regional Boards. However, we do not believe that the Regional Board erred in naming the Port District in these NPDES permits.

4. Contention: The Port District contends that the Board should waive the requirement for a permit as authorized by Section 13269 of the Water Code.

Finding: It is within the Regional Board's discretion to waive waste discharge requirements. The Regional Board's decision to name the Port District is consistent with our previous orders upholding naming non-operating landowners. We see no reason to second-guess the Regional Board.

5. Contention: The Port District contends that NPDES permits may only be modified for specific causes not existing in this case.

⁵ In Order No. 87-5, the State Board stated that "the Forest Service deserves the opportunity to exercise its own authority before the Regional Board holds it responsible for any violations of the [permit] requirements."

Finding: The federal regulations authorize the program director, in this case the Regional Board, to modify a permit if one or more of the causes specified exist. 40 C.F.R.

Section 122.62. Two of the specified causes exist in this situation. A permit may be modified during its term if new information is received that "was not available at the time of permit issuance . . . and would have justified the application of different permit conditions at the time of issuance." 40 C.F.R.

Section 122.62(a)(2). A permit may also be modified during its term to "correct technical mistakes, such as . . . mistaken interpretations of law made in determining permit conditions."

40 C.F.R. Section 122.62(a)(16).

Four of the six permits were adopted prior to the first and only State Board order which upheld the naming of a public agency/landowner in an NPDES permit. The other two permits were adopted 19 days after the State Board order. Four days after the last two permits were issued, the Chief Counsel advised the Regional Boards concerning the issue of landowner liability. Thus, the Regional Board received new information after adoption of the permits that the State Board considered it legally appropriate to name landowners in NPDES permits. The addition of the Port District to the permits was to correct the Regional Board's mistaken interpretation of the law.

6. Contention: The Port District contends that adding it to the NPDES permits violates the California Constitution, Article XIII(B), Section 6.

Finding: Article XIII(B), Section 6 of the California Constitution, prohibits a state agency from mandating a new program or higher level of service on any local government unless the state provides a source of funds to cover the costs of the program or service.⁶ We disagree with the Port District's contention that this constitutional provision applies to NPDES permits. The requirement to reimburse local agencies for state-mandated costs does not apply to NPDES permits issued by the Regional Boards. The NPDES program is a federally-mandated program, rather than state-mandated and the Porter-Cologne Water Quality Control Act, Water Code Sections 13000 et seq., was adopted prior to the applicable date of the provision. Government Code Sections 17513 and 17556(c), which implements Article XIII(B), Section 6, the Legislature excluded costs mandated by federal programs. Further, claims for reimbursement

6 Article XIII(B), Section 6 of the California Constitution provides:

"Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

- (a) Legislative mandates requested by the local agency affected;
- (b) Legislation defining a new crime or changing an existing definition of a crime; or
- (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

of state mandates rest solely with the Commission on State Mandates and not with the agency issuing the underlying order. (Government Code Section 17552.)

In conclusion, we find that the requirements do not violate Section 6 of the California Constitution.

III. SUMMARY AND CONCLUSIONS

1. The Regional Board has the discretion to name non-operating landowners in waste discharge requirements/NPDES permits because landowners may properly be considered "dischargers" under the Clean Water Act and the Water Code. However, such requirements must be consistent with previous State Board orders concerning non-operating public agency landowners. The Regional Board should not seek enforcement of the waste discharge requirements against the petitioner unless there is a continued failure to comply by the tenant after petitioner has been given notice of a lack of compliance and an opportunity to obtain compliance from the tenant.

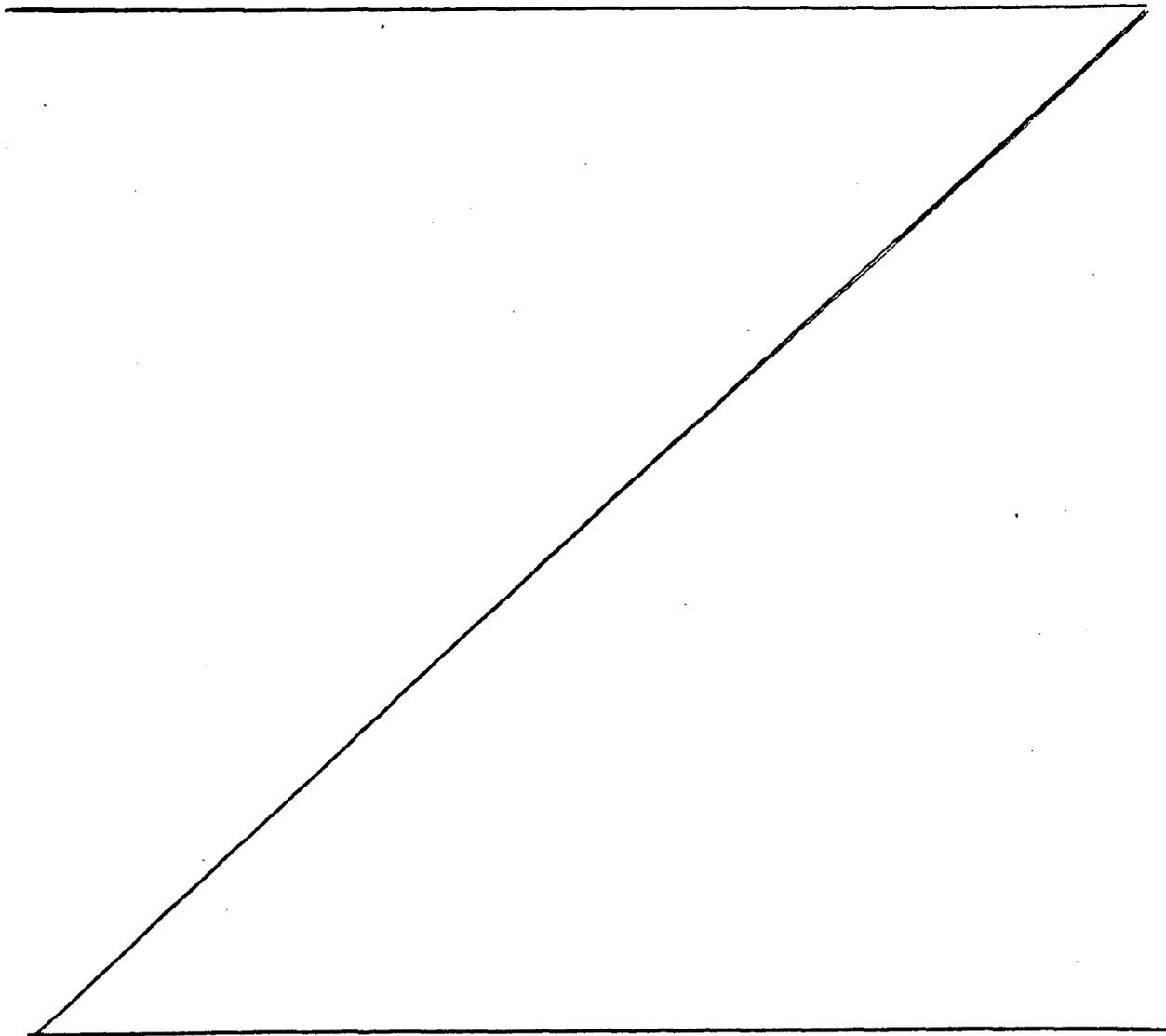
2. The Regional Board did not err in refusing to waive waste discharge requirements for the petitioner.

3. The Regional Board properly chose to modify existing NPDES permits where it found that appropriate causes specified in federal regulations existed.

4. The Regional Board did not violate Article XIII(B), Section 6 of the California Constitution. In addition, such challenges are properly brought before the Commission on State Mandates.

IV. ORDER

IT IS HEREBY ORDERED that Addenda to Regional Board Order Nos. 85-01 (NPDES Permit No. CA 0107646); 85-02 (NPDES Permit No. CA 0107654); 85-03 (NPDES Permit No. CA 0107719); 85-06 (NPDES Permit No. CA 0107671); 87-49 (NPDES Permit No. CA 0108006); 87-65 (NPDES Permit No. CA 0108332) are remanded to the Regional Board to clarify that petitioner is not primarily responsible for day-to-day operations of the facilities or for monitoring requirements specified in the Addenda and that the



Regional Board will provide the petitioner with the opportunity to attain tenant compliance prior to Regional Board enforcement against petitioner as specified in Part III of this order.

IT IS FURTHER ORDERED that in all other respects, the petition is denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 17, 1990.

AYE: W. Don Maughan
Eliseo M. Samaniego
John Caffrey

NO: Edwin H. Finster

ABSENT: Darlene E. Ruiz

ABSTAIN: None


Maureen Marche
Administrative Assistant
to the Board